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IN THE SUPREME COURT OF THE UNITED STATES

No. 1330

OCTOBER TERM, 1969

K. O. SIBLEY, ET AL,

Petitioners

Versus

RURAL ELECTRIFICATION ADMINISTRATION, ET AL,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Brief for the Respondents, Dixie Electric Membership Corporation and Louisiana Electric Cooperative, Inc., in Opposition

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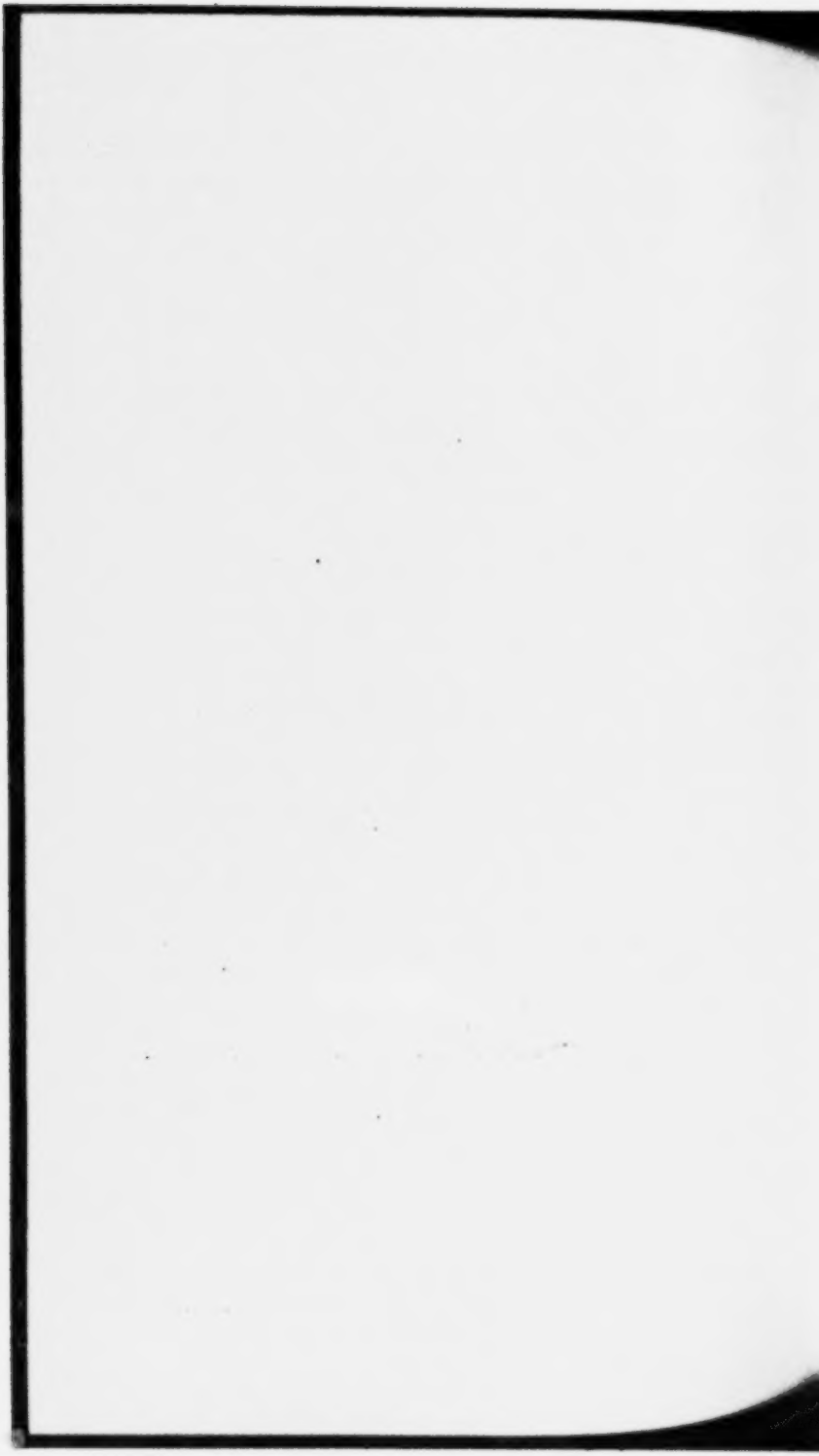

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QUESTIONS PRESENTED

1. Whether petitioners as members of an electric membership cooperative to be served with electric power from another electric membership

cooperative have standing to attack a loan by the Rural Electrification Administration to the latter cooperative to finance the construction of facilities to generate and transmit the electric power.

2. Whether the grant of a loan by the Rural Electrification Administration to an electric membership cooperative is judicially reviewable.

3. Whether petitioners' failure to have complied with the requirement of Rule 23.1, Federal Rules of Civil Procedure, relating to the maintenance of derivative actions, itself justifies dismissal.

STATUTES AND RULES INVOLVED

1. Section 4 of the Rural Electrification Act, 49 Stat. 1365, as amended, 7 U.S.C. 904, provides:

> "Loans by Administrator for electrical plants and transmission lines; preferences; consent of State authorities
>
> The Administrator is authorized and empowered, from the sums herein-

before authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: Provided, That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, munici-

palities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefore as the Administrator shall determine and may be made payable in whole or in part out of the income: Provided, further, That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: And provided further, That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed."

2. Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009(a), provides:

> "Judicial review of agency action.
>
> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion --
>
> Rights of review.
>
> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

3. Rule 23.1, Federal Rules of Civil Procedure, provides:

> "In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the

action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

4. Louisiana Revised Statutes 12:417, provides:

"Notwithstanding any other provision of this Part, any proposition embodied in a petition signed by not less than ten per centum of the members of a cooperative, together with any document submitted with such petition to give effect to its proposition, shall be submitted to the members of a cooperative, either at a special meeting of the members held within forty-five days

> after the presentation of such petition, or, if the date of the next annual meeting of members falls within ninety days after such presentation or if the petitioner so requests, at such annual meeting. The approval of the board of directors shall not be required in respect of any proposition or document submitted to the members pursuant to this Section and approved by them, but such proposition or document shall be subject to all other applicable provisions of this Part. Any affidavit or affidavits required to be filed with any such document pursuant to applicable provisions of this Part shall, in such cases, be modified to show compliance with the provisions of this section."

STATEMENT

This action is the third in a series of federal court actions which have sought to enjoin consummation of a loan by the Rural Electrification Administration ("REA") to Louisiana Electric Cooperative, Inc. ("LEC"), an electric membership cooperative organized and existing pursuant to the Louisiana Electric Cooperative Act, La. R.S. 12:401 et seq. Petitioners

allege that they are members of Dixie Electric Membership Corporation ("Dixie") (R. 2), which is in turn a member and incorporator of LEC (R. 3), and which is to receive electric power to be generated and transmitted by LEC (R. 5, 6). Petitioners due derivatively to enjoin the REA loan to LEC, entered between REA and LEC on September 12, 1964 (R. 53, 54; see also R. 4) for the purpose of construction by LEC of electric generating and transmission facilities to furnish electric power to its member distribution cooperatives (including Dixie) for resale to the latters' ultimate consumers of electricity (R. 53, 54; see also R. 4-6).

Shortly after approval of the loan, four private power companies operating in Louisiana initiated an action in the United States District Court for the Western District of Louisiana seeking to prohibit its consummation on the grounds that the loan did not accord with the purposes of the Rural Electrification Act;

violated the directives of Congressional committees and the terms of REA Bulletin 111-3; and violated the power companies' constitutional rights.[1] Judge Ben C. Dawkins, Jr., issued a preliminary injunction as sought by the power companies, 236 F. Supp. 271, and the Fifth Circuit Court of Appeals reversed in Rural Electrification Administration v. Central Louisiana Electric Co., Inc., 354 F. 2d 859 (C.A. 5, 1966). This Court denied certiorari, Central Louisiana Electric Company, Inc., et al v. Rural Electrification Administration, et al, 385 U. S. 815; reh. den. 385 U. S. 964.

On October 17, 1968, Central Louisiana Electric Company again filed before the United States District Court for the Western District of Louisiana

[1]The complaint in the 1964 case was filed by Central Louisiana Electric Company; Louisiana Power & Light Company, Gulf States Utilities Company, and Southwestern Electric Power Company intervened in support of it.

an action attacking the loan, and the other three power companies again intervened. The same allegations of illegality were made as in the 1964 case, and the same relief was sought. The 1968 proceeding was assigned Number 14,164 on the Western District Docket and, on December 12, 1968, Judge Ben C. Dawkins, Jr., entered therein a temporary restraining order against consummation of the loan. The government defendants immediately applied to the Fifth Circuit Court of Appeals for a stay pending appeal from the order or, alternatively, for a writ of prohibition and/or mandamus. The proceeding was assigned Number 27,097 on the Court of Appeals' Docket. On December 23, 1968, that court entered its order noting that "Granting of a further temporary restraining order by the District Court would, in our view, be improvident* * * *" See R. 212-214. Eight days later, on December 31, 1968 (R. 19), this action, utilizing the

derivative membership suit to assert the same grounds in opposition to the loan as the private power companies had asserted in their two actions, was filed.[2]

Petitioners' complaint alleges that, because defendants "are committed to the construction of generating and transmission facilities * * * regardless of the costs or inconvenience to your petitioners and others similarly situated * * * any effort by your petitioners do dissuade defendants * * * would be vain, futile, and useless." (R. 13; complaint, paragraph 17 (D)). Their prayer is for an injunction against consummation of the loan and the doing of any acts in furtherance of construction of the generating and transmission project, including "the execution or performance of

[2]Petitioners here add two additional alleged bases of illegality to those involved in the previous suits -- violation of the Federal and State Anti-trust Laws, and disadvantage and damage allegedly resultant to Dixie and LEC from certain contracts between LEC and Dixie and between LEC and others. (R. 12)

any power supply contract or any other agreement or undertaking in connection therewith * * * *" (R. 15).

Following Judge Dawkins' recusal of himself from this action and any further matters in the second private power companies' suit,[3] Judge Edwin F. Hunter granted motions to dismiss filed by the government, Dixie, and LEC (R. 220), and entered his Order of Dismissal (R. 224) grounded on lack of standing in petitioners to maintain the suit, and judicial non-reviewability of the subject-matter.[4]

ARGUMENT

1. Because we submit that it is dispositive, we shall deal first with petitioners' admitted failure

---

[3]That action is still pending in the District Court, with no action in its prosecution having been taken since entry of the Court of Appeals' order prohibiting renewal of the temporary restraining order.

[4]In addition to the federal court actions described above, the private power companies, simultaneously

to have:

> "* * * * made any effort to obtain a recision (sic) or modification of the contracts between Dixie Electric, Louisiana Electric and the REA because defendants, Norman M. Clapp and the Boards of Directors of

4 (cont)with initiation of their 1964 federal action, filed a proceeding before the Louisiana Public Service Commission seeking to enjoin construction by LEC of the generating and transmission system unless LEC first secured a certificate of public convenience and necessity from the Commission. The Louisiana Supreme Court held the power companies not entitled to any relief, because of the exemption in Louisiana Revised Statutes 12:426 of electric membership cooperatives from Louisiana Commission jurisdiction. Central Louisiana Electric Company, et al v. Louisiana Public Service Commission, 253 La. 553, 218 So. 2d 592 (1969).

Finally, four members of another electric membership cooperative participating in the LEC project brought a derivative action similar to this one, but in state court. That action was removed to the United States District Court for the Western District of Louisiana, where it bears Number 14,766, under the title J. H. Martin, et al v. Northeast Louisiana Power Cooperative, Inc. The plaintiffs in that action are represented by the law firm which regularly represents Louisiana Power & Light Company, and which has represented it in its various lawsuits seeking to prevent consummation of the loan.

> Dixie Electric and Louisiana Electric, are committed to the construction of generating and transmission facilities * * * regardless of the costs or inconvenience * * * Under these circumstances, any effort to dissuade defendants * * * would be vain, futile and useless." (Complaint, paragraph 18, R. 13).

This allegation falls far short of complying with the clear mandate of Rule 23.1, F.R.C.P. that, in a derivative action:

> "* * * * The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. * * * *" Emphasis added.

Petitioners not only admit their failure to have lodged their grievances with the Boards of Directors of Dixie and LEC, but also fail to deal with the question of utilizing or attempting to utilize the initiative procedures of the Louisiana Electric Cooperative Act contained in La. R. S. 12:417 which make readily

available to aggrieved members recourse, even at a special meeting called therefor, to the entire cooperative membership, in the following terms:

> "* * * * any proposition embodied in a petition signed by not less than ten per centum of the members of the cooperative * * * shall be submitted to the members of a cooperative, either at a special meeting of the members held forty-five days after the presentation of such petition, or, if the date of the next annual meeting of the members falls within ninety days after such presentation or if the petition so requests, at such annual meeting. The approval of the board of directors shall not be required in respect of any proposition * * * *"

Certainly the bare allegation that defendants and the Dixie and LEC Boards of Directors "are committed to the construction of generating and transmission facilities * * * regardless of the costs or inconvenience * * * *" (R. 13) does not "allege with particularity", as required by Rule 23.1, F.R.C.P., the reasons for petitioners' failure to at least approach the Boards of

Directors about their grievances, much less explain their failure to have undertaken the statutorily guaranteed initiative procedure of La. R. S. 12:417. Surely such general allegation will not suffice to maintain such an action as this, instituted just eight days following rebuff of private power companies' judicial efforts to obtain the same result it seeks, and involving one of those companies' attorneys not only as counsel of record, but also another as a party plaintiff herein.[5] As stated by this Court in sustaining a demurrer in United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261 (1917):

> "Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a

[5]The firm of Taylor, Porter, Brooks & Phillips has represented Gulf States Utilities Company in all of its litigation against the loan here in question; additionally, Frank W. Middleton, Jr., one of the petitioners herein, is a member of that firm.

matter of internal management, and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery. In the instant case there is no allegation that the United Copper Company is in the control of the alleged wrongdoers, or that its directors stand in any relations to them, or that they have been guilty of any misconduct whatsoever. Nor is there even an allegation that their action in refusing to bring such suit is unwise. No application appears to have been made to the stockholders as a body, or indeed to any other stockholders individually; nor does it appear that there was no opportunity to make it, and no special facts are shown which render such application unneccessary. For aught that appears, the course pursued by the directors has the approval of all

> the stockholders except the plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation." 244 U. S. 263-265; Emphasis added.

As a matter of law, particularly in view of the expeditious procedure provided by La. R. S. 12:417 therefor, it is submitted that petitioners' complaint is fatally defective for non-compliance with Rule 23.1 F.R.C.P. Their complaint attempts to call into question the wisdom and business judgment exercised by the Boards of Directors of Dixie and LEC in entering the contracts and arrangements complained of. A frequently cited statement of the law concerning maintenance of derivative actions is that of Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936):

> "(Stockholders) cannot secure the aid of a court to correct what appear to them to be mistakes of judgment on the part of the officers. * * * This rule

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> applies whether the mistake is due to error of fact or of law, or merely to bad business judgment. * * * *" 56 Sup. Ct. at p. 481.

In Hawes v. Oakland, 104 U. S. 450, the United States Supreme Court affirmed dismissal of a derivative action seeking to enjoin a water company from giving away water, in excess of an amount to which a municipality was legally entitled. The Court stated:

> "The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California, may take this view of it and be content to abide by the action of their directors. If this be so, is a bitter litigation with the City to be conducted by one stockholder for the Corporation and all other stockholders, because the amount of his dividends is diminished?" 104 U. S., at p. 462.

2. Petitioners place strong reliance upon this Court's recent decisions in Association of Data Processing Service Organizations, v. Camp, _____ U. S. _____, 90 S. Ct. 827 (1970) and Barlow v. Collins,

_____ U. S. _____, 90 S. Ct. 832 (1970), in seeking reversal of the lower courts' decisions herein. But in so doing, petitioners misplace their reliance, and overlook a fundamental basis of the actions of the lower courts in this case, that:

> "The effect of our holding in Rural Electrification Administration v. Central Louisiana Electric Co., supra, cannot be so easily circumvented. There the Court specifically held that apart from the plaintiff's lack of standing, the Courts are without jurisdiction to review the Agency's loan-making authority. The holding has been reiterated in Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F. 2d 672 (5th Cir. 1968), certiorari denied 393 U. S. 1000, 89 S. Ct. 488, 21 L. Ed 2d 465." K. O. Sibley, et al v. Rural Electrification Administration, et al, 419 F. 2d 384 (C.A. 5, 1969).

From the foregoing, and especially from the language of the Fifth Circuit in Rural Electrification Administration v. Central Louisiana Electric Co., Inc., supra, in which this Court denied certiorari in a case involving an attack upon the same REA loan here

involved, it is clear that the Court of Appeals decided the issue of judicial reviewability of the grant of an REA loan in accordance with the principle enunciated in Camp, followed in Barlow, that:

> "* * * *There is great contrariety among administrative agencies created by Congress as respects 'the extent to which, and the procedures by which, different measures of control afford judicial review of administrative action.' Stark v. Wickard, 321 U. S. 288, 312, 64 S. Ct. 559, 572, 88 L. Ed. 733 (Justice Frankfurter dissenting). The answer, of course, depends on the particular enactment under which review is sought. It turns on 'the existence of courts and the intent of Congress as deduced from the statutes and precedents.' Id., at 308, 64 S. Ct. at 570." 90 S. Ct., at p. 831.

Unlike the statutory provisions before the Court in Camp and Barlow, those of the Rural Electrification Act, 7 U.S.C. 901 et seq., have been the subject of frequent judicial consideration, and form a substantial body of precedent, beginning with this Court's decision in Alabama Power v. Ickes, 302 U. S. 464, 58 S. Ct.

300, 82 L. Ed. 374 (1938); Kansas City Power & Light Co. v. McKay, 225 F. 2d 924 (D. C. Cir., 1955); Rural Electrification Administration v. Central Louisiana Electric Co., supra; Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F. 2d 672 (C. A. 5, 1968), cert. den, 89 S. Ct. 488; Rural Electrification Administration v. Northern States Power Co., 373 F. 2d 686 (C. A. 8, 1967), cert. den. 387 U. S. 945. The observation of the Fifth Circuit Court of Appeals in Rural Electrification Administration v. Central Louisiana Electric Co., supra, well substantiates the propriety of the dismissal below of this action for lack of judicial reviewability:

> "* * * * we are totally convinced that Congress has never enacted or intended that loans by this Agency should be reviewable in the Courts. The Act itself makes no provision for judicial loan review.* * * *" 354 F. 2d, at p. 865.

And, in Rural Electrification Administration v.

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Northern States Power Co., supra, in which this Court denied certiorari, the following pertinent observation regarding judicial review was set forth:

> "* * * * Congress has steadfastly refused to provide judicial review under 7 U.S.C. Sec. 901 of the REA Act. This silence could be premised on the concern that the private supplier could otherwise interfere with REA loans in each instance where the Administrator finds the public suppliers' proposal unreasonable." 373 F. 2d, at p. 700.[6]

[6]This concern, if felt, as we believe it is, is indeed justified. Since the announcement in 1964 of the loan here attacked, the power companies which have been parties to the various actions brought against it have initiated two suits before the Federal District Court for the Western District of Louisiana (Central Louisiana Electric Company v. Rural Electrification Administration, et al, Number 10,552 - preliminary injunction reversed as above set forth; Central Louisiana Electric Company v. Rural Electrification Administration, et al, Number 14,164 - temporary restraining order ordered not renewed as above set forth), and one before the Louisiana Public Service Commission culminating in the decision of the Louisiana Supreme Court in Central Louisiana Electric Company, et al v. Louisiana Public Service Commission, supra. Additionally, as pointed out above, one of the plaintiffs in the instant suit is

This conclusion is not only warranted, but compelled, by consideration of the history of the REA Act. For example, the original REA legislation in 1936 intended to vest in the Administrator a broad delegation of power as to generating and transmission loans. Throughout the debates on the original REA Act (now over 30 years ago) the bill was attacked on the ground that broad loan discretion would be vested in the Administrator. There were complaints that large expenditures could be made on the authority of one man and that it was unwise to allow REA funds to be used without definite instructions

6 (cont) actually a member of the law firm which regularly represents Gulf States Utilities Company, one of the opposing utility companies; and, in still another action, J. H. Martin, et al v. Northeast Louisiana Power Cooperative, Inc. and Louisiana Electric Cooperative, Inc., Number 14,766 on the Western District Docket, four members of Northeast Louisiana Power Cooperative, Inc., are represented by the law firm which regularly represents Louisiana Power & Light Company, and has represented it in its various lawsuits seeking to prevent consummation of the loan.

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and supervision. It was even charged that such legislation (i.e. that giving such broad loan authority) would tend towards "producing in this country a bureaucratic and socialistic state" (see discussion in 80 Congressional Record 5277-5279). Congressman Rayburn, Chairman of the Interstate and Foreign Commerce Committee, who piloted the House legislation replied to this criticism:

> "The gentleman from Connecticut (Mr. Merritt) remarked about the bill and the great power that was given to the Administrator. Well, the power must be lodged somewhere, and, as far as I am concerned, with a man like Morris Cooke at the head of it, I am satisfied to have the power lodged there." (80 Cong. Rec. p. 5281).

Nor have subsequent efforts to restrict the Administrator's authority over generating and transmission facility loans, by subjecting such loans to outside review, resulted in any such change in the REA statute. Congress has repeatedly rejected

proposals to provide for review of REA loans outside REA, including, inter alia:

(1) Rejection in 1939 of the McGranery bill (H. R. 6292, 76th Congress, 1st Session 84 Congressional Record 5480). This bill would have required a finding of lower power costs to be made by an independent agency of three engineers upon demand of anyone having facilities for supplying such power. The bill never came out of Committee.

(2) Rejection in 1946 of Senator Gurney's proposal requiring certification by the Federal Power Commission "that there is not sufficient electric current available in the area at a reasonable rate" before a loan for generating and transmission facilities could be made. This was rejected on a roll call in the Senate when the REA Deficiency Appropriation for 1946 was considered (21 yeas, 52 nays). See 92 Cong. Record 1799-1817.

(3) In 1962 private power companies proposed an amendment to REA loan procedures which would have read:

> "Provided, that loans for generating capacity shall not be made by the Administrator where there is an adequate supply of electric energy available from investor-owned taxpaying sources at publicly regulated rates and conditions of service, nor shall such loans be made until after due public notice has been given by the Administrator and provision

> made for interested parties to be heard in connection therewith." (See 87th Cong., 1st Sess., Hearings on H. R. 10010, Food and Agriculture Act of 1962, pp. 677-713.

The House Committee did not take favorable action on this proposal. A similar amendment proposed in the Senate by privately-owned power companies was rejected, the Committee stating:

> "The Committee has not recommended inclusion in the bill of the amendment recommended by the investor-owned power companies. As indicated by the above discussion, this is a matter in which the Administrator should be left free to exercise his discretion on the basis of all the diverse facts of each case." (Emphasis supplied) (See Senate Committee Report No. 1787, 87th Cong. 2nd. Sess.; found in U. S. Code Cong. and Adm. News, 1962, Vol. 2, pp. 2662-2693, at p. 2670)

Significantly the same Committee report (at p. 2670) took cognizance of the fact that the existence of a situation in which the private power companies use their position to restrict the REA borrowers to the most unprofitable customers (i.e. the territorial integrity concept) is a proper consideration for the Administrator to apply in granting a generating facility loan. The Committee stated:

"Correspondingly, to the extent that investor-owned companies will serve REA borrowers only on conditions which are not fair and reasonable, or which restrict the REA borrowers to the most unprofitable customers, the need for loans to construct generating facilities is increased."[7] (Emphasis supplied)

[7]U. S. Code and Adm. News, 1962, Vol. 2, at p. 2670. It is to be noted that, in addition to power cost savings, the loan here involved was made "to end or lessen the dependence of the Member Cooperatives for wholesale power upon commercial power companies which were using their position as wholesale suppliers to the Member Cooperatives to extend retail services to the consumers and potential consumers of the Member Cooperatives and otherwise encroach upon their service areas, thereby posing a threat to the security interests of United States related to approximately $86,000,000.00 of REA loans to the Member Cooperatives and threatening also the continuance or improvement in the costs of electric service to many thousands of rural consumers in Louisiana." Affidavit of Norman Clapp, REA Administrator; R. 54. The method of encroachment and nature of the threat are illustrated by the following: "* * * * Throughout its service area, Dixie has, particularly within approximately the past ten years, suffered serious encroachments upon and into its service area by competing commercial power companies, and particularly Gulf States Utilities Company, Dixie's chief supplier of wholesale power. A common method of encroachment has involved the power companies' 'underbuilding' transmission lines constructed to furnish power to

(4) Proposal has been made in the Congress to amend the REA Act to provide for judicial review of REA loans. Hearings were held in May, 1965, by the sub-committee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1336, 89th Congress 1st Sess. In such hearings the proposal has been opposed by the National Rural Electric Cooperative Association. No action was taken on the proposal.

In sum, then, we reiterate that the legislative history recounted above amply substantiates the body of jurisprudence which has developed the principle that the grant of REA loans is not judicially reviewable. There is no conflict between this Court's analysis in Camp and Barlow of judicial reviewability and that accorded the question in the jurisprudence which has developed concerning reviewability of loans granted

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7(cont) Dixie's metering points, at which Dixie receives the power for distribution; by underbuilding distribution lines beneath the transmission lines required to be built to serve Dixie, the power companies have utilized the transmission facilities to seriously encroach upon Dixie's service area. * * * *" Affidavit T. Scott McVea, President of Dixie Electric Membership Corporation; R. 70.

pursuant to the REA Act, that "The statute not only fails to provide for judicial review, but when construed in the light of its purpose and of legislative history, the statute retains oversight of the Administrator's actions in the hands of Congress itself and precludes judicial review." Alabama Power Company v. Alabama Electric Cooperative, Inc., supra, at p. 675.

> 3. "Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies'. As we recently stated in Flast v. Cohen, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953, 20 L. Ed 2d 947 '* * * /I/n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" Association of Data Processing Service Org., Inc. v.

Camp, _____U.S. _____, 90 S. Ct., at p. 829 (1970).

"* * * * The question of standing * * * concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." id, at 90 S. Ct., p. 830.

So spoke this Court regarding, apart from the reviewability question, the matter of standing, in its recently decided Association of Data Processing Service Org., Inc. v. Camp, supra. In view of the line of decisions of this Court and lower federal courts analyzing the Rural Electrification Act, and uniformly concluding that private utilities do not have standing as competitors of REA loan beneficiaries, such as Dixie and LEC, to challenge REA loans to such beneficiaries, the salient question concerning standing presented by this case is whether, by the simple expedient of presenting in a members' derivative suit the various charges of

illegality historically leveled against REA loans by competing private utilities, standing to challenge such loans can be achieved, particularly in the context of this action, in which the challenge is brought by the attorneys for one of the same private utilities to which standing to challenge the same loan was denied in Rural Electrification Administration v. Central Louisiana Electric Co., Inc., supra. Upon analysis, the only interests which petitioners purport to advance by this action are protection against "higher electric rates" (complaint, paragraph 18; R. 13) as consumers of electricity, and against the possibility that Dixie and LEC would be subjected to penalties under the Anti-Trust Laws as a result of the contractural arrangements between them. No other allegation of their complaint asserts any injury whatsoever to petitioners, either individually or derivatively.

With regard to the first respect in which

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petitioners' complaint purports to set forth an interest - that in protection against higher electric rates - it is entirely clear upon consideration of the provisions of the Rural Electrification Act upon which petitioners attempt to ground their action, 7 U.S.C. 904, that its purpose in authorizing the approval by the Rural Electrification Administration of generating and transmission loans is simply to permit the financing of generating and transmission systems upon reasonably adequate security for the United States. The provisions of 7 U.S.C. 904 do not even arguably place within the ambit of the statute's purpose an interest of those who will receive electric service as a result of the loan in having such service at any given ultimate level of rates - whether higher, lower, or the same as potential alternate sources. In view of the myriad interests of the United States to be served by the grant of such a loan (here, for example, protection of the government's

security interest in an $86,000,000.00 investment in rural cooperative distribution lines in Louisiana, against encroachment through "underbuilding" by private utilities on the service area of such cooperatives, R. 59, 69, 70), it certainly cannot be gainsaid that the statute was intended to accord to anyone standing to judicially review ultimate rate levels. To so hold would here imperil the security interests of the United States in millions of dollars in loans made to extend the benefits of electric service to thousands of persons to whom it has not otherwise been available, and would defeat rather than serve the Congressional purpose in enacting rural electrification legislation; to so hold would permit judicial challenge of each and every REA loan to the many electric and telephone systems financed thereby across the land, on the mere allegation of a customer or member that the loan would increase his service rates. Such a result

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could only be countenanced if the statutory scheme under consideration intimated a purpose to assure a given level of rates to customers or members, thereby bringing that "within the zone of interests to be protected or regulated by the statute * * * *", Association of Data Processing Service Org., Inc. v. Camp, supra, 90 S. Ct., at p. 829. But here, the statute not only fails to so intimate, but, moreover, when taken in light of the legislative history referred to above and expressly noted by the courts, it clearly negates such a reading. And, aside from an interest in a given level of rates, the only other respect in which petitioners attempt to assert an interest which could arguably give them standing - allegations of Anti-Trust violations in the contracts between LEC and Dixie - a complete answer is furnished by Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F. 2d 672 (C.A. 5, 1968), in which this Court denied certiorari, 393 U. S. 1000.

Nor does Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936), upon which petitioners rely, demonstrate in any way that they have standing here to enjoin the grant of an REA loan. We have here no allegation of breach of trust or duty on the part of the Boards of Directors of LEC or Dixie, of the nature of "* * * * yielding, without appropriate resistence, to governmental demands which are without warrant of law or are in violation of constitutional restrictions * * * *" nor "* * * *failure to assert the rights and franchises of the corporation against an unwarranted interference through legislative or administrative action." Id, at p. 319. Applying the standing analysis laid down by this Court in Camp, complainants in Ashwander clearly alleged themselves to have had a substantial ownership interest arguably protected by the constitutional limitations allegedly exceeded by the TVA legislation pursuant to which their corporation had contracted. Differently, as we have above

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demonstrated, petitioners in this case have not alleged any interest which, upon analysis of the applicable statutory provisions, grants them the standing requisite to maintenance of this action.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I, Paul M. Hebert, one of the attorneys for respondents Dixie Electric Membership Corporation and Louisiana Electric Cooperative, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of _____, 1970, I served copies of this Brief in Opposition to the Petition for Certiorari on the petitioners and all other parties of record to this proceeding, by depositing the same in the United States Post Office, with airmail postage prepaid, addressed to the following parties:

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